IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. .....

SEARS, ROEBUCK AND CO., a corporation,

Petitioner,

vs.

LILLIAN M. HOYT AND EZRA H. HOYT, JR.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion of the Court Below.

No opinion was written by the court of first instance. The opinion written by the United States Circuit Court of Appeals for the Ninth Circuit was filed September 12, 1942, but is not yet reported in the Federal Reporter. The opinion is set forth at pages 174 to 178 of the record filed herewith.

Basis of Jurisdiction.

The judgment of the Circuit Court of Appeals to be reviewed was filed and entered September 12, 1942. [See Record, p. 178.] No petition for rehearing in that court was filed. This petition for writ of certiorari is filed

within three months after the filing of the judgment of the Circuit Court of Appeals.

In the Circuit Court of Appeals, petitioner claimed that the United States District Court had jurisdiction of this cause, and that any irregularity in connection with removal of this cause from the state court to the United States District Court could be and was waived by failure of the opposing parties to object to removal of the case from the state court, their failure to move to remand the case to the state court, and their failure to make any objection whatsoever until the case had reached the Circuit Court of Appeals. [See Record, p. 175.] The Circuit Court of Appeals held that the United States District Court did not have jurisdiction over this cause, and reversed the judgment, with instructions to remand to the state court. [See Record, pp. 174 to 179.]

The jurisdiction of this court is invoked under section 240 of the Judicial Code (28 U. S. C. A., Sec. 347).

This court may review on certiorari action of the Circuit Court of Appeals in directing remand of a cause to the state court.

Gray v. Ruff, 292 U. S. 25, 54 S. Ct. 608, 78 L. Ed. 1099.

Statement of the Case.

The essential facts of the case are stated in the accompanying petition for writ of certiorari, and in the interest of brevity are not here repeated.

Specification of Errors.

The Circuit Court of Appeals erred in holding that the United States District Court did not have jurisdiction of this cause.

Summary of Argument.

The District Court acquired and had jurisdiction of this cause, and any irregularity in connection with the removal of the case from the state court to the District Court was waivable, and was waived by failure of respondents to object to the removal, and by their failure to move to remand the case to the state court.

Argument and Authorities in Support of Petition.

Petitioner respectfully contends that there is no jurisdictional question involved in this case. At the most, there was a mere irregularity which could have been cured by a motion to remand. The District Court had before it a controversy between citizens of different states, with each party seeking to recover a sum of money in excess of the jurisdictional minimum of $3000.00, hence it certainly had jurisdiction of the subject matter, and of course the matter of jurisdiction over the person of the parties was something which could be, and was, waived by the parties by voluntarily submitting themselves to the jurisdiction of the court. The respondents were perfectly willing to submit the case to the trial judge for decision, and they made no objection to the court exercising its jurisdiction over them. The irregularity, if any, in the method of getting the parties before the District Court did not operate to deprive that court of jurisdiction over the subject matter or the parties. By failing to move to remand the cause to the state court, the respondents waived any irregularity which might have been committed in the removal of the cause to the United States District Court, and even if there was irregularity in removal of the cause, the fact remains that the cause was removed to the District Court,

and that court was requested by all parties to the action to proceed to render judgment therein. Inasmuch as removal proceedings are in the nature of process to bring the parties before the District Court, it naturally follows that where the District Court is presented with a cause involving the requisite diversity of citizenship and amount involved, and all of the parties voluntarily appear and submit themselves to the jurisdiction of the court and proceed to trial without objection, the court has jurisdiction of the cause and of the parties and will not, of its own motion, inquire into the regularity of the manner in which the cause came before the court.

Mackay v. Uinta Co., 229 U. S. 173.

Removal is a Federal question, under a Federal statute, and a motion to remand is the proper and usual method of testing the sufficiency and regularity of removal proceedings. Organic power to hear the controversy existed in the case at bar, and it is immaterial how the parties got into court; it is sufficient that they did come before the court and submit their controversy to it for decision, without raising any objection or making any attempt to prevent the court from deciding the case upon its merits. In this case we have a situation where removal of the cause became an accomplished fact, and the respondents failed to exercise their right to have the cause remanded to the state court and permitted the District Court to try the case and render judgment without objection from them.

The situation in this case is the same as if each of these parties had originally filed their respective actions in the United States District Court, which could have been done in this instance because of the diversity of citizenship and

the large amount of money prayed for by each of the parties. Certainly, neither party would then have contended that said court would not have jurisdiction, and it becomes apparent that the jurisdictional elements likewise existed in this case whether or not the case was irregularly brought into the United States District Court.

Having failed to move to remand the cause to the state court, and having proceeded to trial in the United States District Court, without protest, the respondents certainly acquiesced in the jurisdiction of the United States District Court over their persons so as to forfeit their privilege to have the case remanded to the state court. The respondents asked the court on appeal, for the first time, to do of its own motion what they should have requested of the District Court promptly upon removal of the case to the District Court, to-wit, to remand this case to the state court. Inasmuch as the respondents did not see fit to move to remand the case to the state court and did not make any objections whatsoever on this score until they filed their opening brief on appeal, there was of course no ruling of the trial court to review, because no ruling was requested or made in this connection.

We respectfully submit that the authorities are uniform to the effect that under such circumstances the District Court was entitled to proceed to render judgment, and that the respondents, disappointed in the judgment and raising the point for the first time on appeal, waived the right to have the cause remanded to the state court.

The leading case on this question is that of *Mackay v. Uinta Development Company*, 229 U. S. 173, decided by this Court on May 26, 1913. In that case the Uinta Development Company, a Wyoming corporation, brought an action in the state court in Wyoming against Mackay,

a Utah citizen, to recover $1,950 damages. In an amended answer filed by Mackay, a counter-claim for $3,000 damages was set up, and although Mackay's time to plead to the original complaint had expired, he then filed a petition to remove the case to the United States Circuit Court for the District of Wyoming, and an order of removal was granted on the theory that the parties were citizens of different states, that the amount in dispute as disclosed by the counter-claim exceeded $2,000 and that the construction of Federal statutes was necessarily involved in the dispute. The transcript of the record was subsequently filed in the United States Court, and both parties appeared therein. The plaintiff filed in the United States Court a reply to the counter-claim, and the case was subsequently tried in said court and judgment was entered in favor of the Uinta Development Company, whereupon Mackay, disappointed at the outcome of the case, took an appeal, but on appeal neither party raised any question as to the power of the trial court to determine the cause. The Circuit Court of Appeals, however, certified to this Court the following question (page 175):

> "Assuming that the removal at the instance of Mackay was not in conformity with the removal statute, and assuming that as respects his claim against the Development Company all the jurisdictional elements were present which were essential to enable the Circuit Court to take cognizance thereof, if he had commenced an action thereon in that court, and assuming that in such an action the Development Company lawfully could have set up its claim as a counter-claim and thereby have enabled the court to take cognizance thereof, did the parties by appearing in the Circuit Court and there litigating both claims to a final conclusion in a single cause, without

any objection to the jurisdiction of the court or to the manner in which its jurisdiction was invoked enable that court to take cognizance of the controversy and to proceed to a final judgment therein with like effect as if they had invoked the jurisdiction of that court in the first instance through an action commenced therein by Mackay upon his claim and through the interposition by the Development Company of its claim as a counter-claim in that action?"

In answer to this question, this Court said (pages 175-177):

"This question must be answered in the affirmative, and that fact makes it unnecessary to consider the status of the parties in the state court and who was technical plaintiff and who technical defendant, or whether Mackay, a non-resident defendant, sued in a state court for $1,950, could, by filing a counter-claim for $3,000, acquire the right to remove the case to the United States Court. The case was removed in fact, and, while the parties could not give jurisdiction by consent, there was the requisite amount and the diversity of citizenship necessary to give the United States Circuit Court jurisdiction of the cause. The case, therefore, resolves itself into an inquiry as to whether, if irregularily removed, it could be lawfully tried and determined.

"Removal proceedings are in the nature of process to bring the parties before the United States court. As in other forms of process, the litigant has the right to rely upon the statute and to insist that, in compliance with its terms, the case shall be taken from the state to the Federal court in the proper district, on motion of the proper person, at the proper time, and on giving the proper bond. But these pro-

visions are for the benefit of the defendant and intended to secure his appearance. When that result is accomplished by his voluntary attendance, the court will not, of its own motion, inquire as to the regularity of the issue or service of the process,—or, indeed, whether there was any process at all, since it could be waived, in whole or in part, either expressly or by failing seasonably to object. Powers v. C. & O. Ry., 169 U. S. 92, 98.

"What took place in the state court may, therefore, be disregarded by the court because it was waived by the parties, and regardless of the manner in which the case was brought or how the attendance of the parties in the United States court was secured, there was presented to the Circuit Court a controversy between citizens of different states in which the amount claimed by one non-resident was more than $2,000, exclusive of interest and costs. As the court had jurisdiction of the subject-matter the parties could have been realigned by making Mackay plaintiff and the Development Company defendant, if that had been found proper. But if there was any irregularity in docketing the case or in the order of the pleadings such an irregularity was waivable and neither it nor the method of getting the parties before the court operated to deprive it of the power to determine the cause."

In the case of *Lopata v. Handler,* 121 Fed. (2d) 938, where it was contended that the Circuit Court of Appeals should reverse the judgment with directions to remand the case to the state court because the action was not one which was properly removable to the United States District Court, inasmuch as certain individual defendants were residents of the State of Oklahoma where the action

was originally instituted and there was not a separable controversy between the plaintiffs and the other defendants, the Circuit Court of Appeals for the Tenth Circuit held, on July 24, 1941, that the plaintiffs had waived the right to have a remand of the cause to the state court.

As in the case at bar, the question of remand was raised for the first time on appeal, and the parties proceeded to trial on the merits. The action was one which could have been brought originally in the United States District Court. The Circuit Court of Appeals said (page 940):

> "Where a suit is one of which a federal court may take jurisdiction, that is, a case which the plaintiff might properly bring in a federal court, and the defendant procures its removal from a state court, although such removal is wholly unauthorized, and the plaintiff acquiesces in such removal, the federal court acquires jurisdiction.
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> "Here, counsel for the plaintiffs affirmatively stated in open court that they would not seek to have the cause remanded, proceeded to trial on the merits, and thus waived the right to have the cause remanded.
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> "The motion to reverse with directions to remand the action to the state court is denied."

In the case of *Fienup v. Kleinman,* 5 Fed. (2d) 137, where the plaintiff commenced an action in a state court against a citizen of that state and against a citizen of another state who caused the case to be removed to the Federal court, and the plaintiff subsequently asked for and obtained from the Federal court an injunction against the defendants, without making any special appearance in the Federal court or making any objections to the jurisdiction of the Federal court, but subsequently moved to

remand the case to the state court, the Circuit Court of Appeals for the Eighth Circuit held that the order denying his motion to remand the case to the state court should be sustained, and that the Federal court had jurisdiction of the case. The Circuit Court of Appeals said (page 139):

> "It was not until after the plaintiff had procured this injunction from the federal court below, nor until more than eight months after the order of removal of this case to that court was made, and on April 24, 1920, that Mr. Fienup made his motion to remand this case to the state court. Never prior to that day had he made any objection to the jurisdiction of the federal court below; never had he made any special appearance therein. Meanwhile he had applied to that court for and obtained from it an order for an injunction. That application was a general appearance by him in that court, and an invocation of the exercise by that court of its general jurisdiction on his behalf, and with his long delay constituted a complete waiver of his right or privilege, if he ever had any, to a remand of this case to the state court and conclusively estopped him from obtaining such relief. 1 Foster Federal Practice (5th Ed.), p. 195, sec. 61; *In re* Moore, 209 U. S. 490, 496, 28 S. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; Corwin Mfg. Co. v. Henrici Washer Co. (C. C.), 151 F. 938; Philadelphia & Boston Face Brick Co. v. Warford (C. C.), 123 F. 843."

In the case of *Handley-Mack Co. v. Godchaux Sugar Co.*, 2 Fed. (2d) 435, where a New York corporation brought an action in the state court of Tennessee against a Tennessee corporation, and the defendant caused the case to be removed to the United States District Court,

but the plaintiff made no motion to remand the case to the state court, the Circuit Court of Appeals for the Sixth Circuit held that, although the defendant, being a resident of Tennessee, was not entitled to remove the case to the federal court, the court had jurisdiction to render judgment, and the Circuit Court of Appeals affirmed the judgment. The Circuit Court of Appeals said (pages 436, 437):

> "The subject-matter of the instant suit was thus within the original jurisdiction of the District Court. Defendant's counsel says he had at the time doubt of defendant's right to remove, and that plaintiff's counsel thought the right existed. The latter says that on receipt of the notice of removal he suggested to opposing counsel that defendant was not entitled to remove, but that he would not oppose removal because he had been in doubt (presumably when commencing suit) as to the choice of forum. Plaintiff could have brought its suit originally in the District Court below. Had the legality of the removal been questioned, plaintiff could, and presumably would, have discontinued the suit then pending in the federal court and have sued again, and—if desired—in the same District Court, which would thereby have acquired unquestioned jurisdiction. If not barred by limitation, it could presumably still sue in the court below. Plaintiff's submission to defendant's removal proceeding and the reforming of its pleadings to meet the situation was, in a not improper sense, a short cut to the same result. Save so far as implied in the direction in Martin v. Snyder, to remand a case 'reversed for want of jurisdiction,' we find no holding of the Supreme Court that a removal by a nonresident defendant—first provided for by the act of 1887-88 (and since Railway Co. v. Swan and Ayers

v. Watson)—is vital to the jurisdiction of the District Court to hear the case, in the sense that the court has no discretion but to remand it, in spite of original jurisdiction to hear it and long-continued acquiescence by the parties, as well as the court's trial and decision thereunder."

* * * * * * * *

"Whether or not in the early removal cases under the statutes of 1875 and 1887-88 the term 'jurisdiction' was used less strictly than it latterly has been, there is persuasive authority tending to support a view that jurisdiction will be retained, where as here, although the case was not technically removable under the statute, the court yet had jurisdiction over the subject-matter of the controversy, and the parties had fully consented to the federal jurisdiction and acted thereunder."

* * * * * * * *

"We think it is not our duty, upon the situation here presented, to remand the case upon our own motion and against the wishes of both parties."

In the case of *Fidelity & Deposit Co. of Maryland v. Burden*, 53 Fed. (2d) 381, where a case was removed to the Federal court because of the claimed existence of a diversity of citizenship and the requisite amount involved in the controversy giving jurisdiction to the court, and the appellant proceeded to trial on the merits without protest, and thereafter the appellant sought to have the case remanded to the state court, the Circuit Court of Appeals for the Second Circuit said (page 381):

"The issues presented on this appeal were disposed of in Fidelity & Deposit Co. of Maryland v. Burden, 30 F. (2d) 610, except that since our decision an

application was made in the District Court to remand the case to the state court, which was denied. The cause was removed to the federal court because of the claimed existence of a diversity of citizenship and the requisite amount involved in the controversy giving jurisdiction to the court. The appellant proceeded to trial on the merits without protest. The court below held that this was an acquiescence in the jurisdiction of the person so as to forfeit the privilege which might have existed to remand the cause to the state court. With that determination, we agree. Matter of Moore, 209 U. S. 490, 28 S. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; Mackay v. Uinta Co., 229 U. S. 173, 33 S. Ct. 638, 57 L. Ed. 1138; Bailey v. Texas Co., 47 F. (2d) 153 (C. C. A. 2). The other issues are affirmed on the authority of Fidelity & Deposit Co. v. Burden, *supra.*

"Judgment affirmed."

In the case of *Bailey v. Texas Co.*, 47 Fed. (2d) 153, where the plaintiff brought an action in the state court and one of the defendants caused the case to be removed from the state court to the United States District Court on the ground that the action against it was a separable controversy, and thereafter other defendants appeared in the United States District Court and the case was eventually tried in that court, and jurisdiction of the District Court was challenged for the first time on appeal from the judgment, the Circuit Court of Appeals for the Second Circuit held that the removal of the cause from the state court to the United States District Court was not authorized and was improper, but the Circuit Court of Appeals held that when a plaintiff goes to trial without asking for a remand, the cause being one of which the

statute gives the court jurisdiction, the court may proceed to judgment.

To the same effect, see:

In re Moore, 209 U. S. 490;
Western Loan Company v. Butte, 210 U. S. 368;
Kreigh v. Westinghouse, 214 U. S. 249;
Arizona v. Clark, 235 U. S. 669;
General Investment Company v. Lake Shore, 250 Fed. 160;
Mellon v. International, 32 Fed. (2d) 390;
Jacobson v. Chicago, 66 Fed. (2d) 688;
Carpenter v. Baltimore, 109 Fed. (2d) 375.

Petitioner concedes that if respondents had moved in the United States District Court to remand the cause to the state court, the case of *Shamrock Oil and Gas Corp. v. Sheets*, 313 U. S. 100, 85 L. Ed. 1214, 61 Sup. Ct. 868, would be applicable, because in that case the appellant had promptly moved in the United States District Court to remand the cause to the state court, and this court held that the motion to remand should have been granted. However, it is the contention of petitioner that the *Shamrock* case is not applicable to the facts in the case at bar, for the reason that respondents herein made no effort to have the case remanded to the state court, nor did they at any time make any objections whatsoever to any of the proceedings in the United States District Court. Petitioner contends that the decision rendered by the Circuit Court of Appeals for the Tenth Circuit, in the case of *Lopata v. Handler*, 121 Fed. (2d) 938, hereinbefore referred to, subsequent to the time when this court handed down its decision in the *Shamrock* case, represents the true law applicable to such a situation as is presented in

the case at bar. The *Shamrock* case involved a question of jurisdiction solely because the complaining party was retained in the Federal court against his will, and the Federal court never acquired the jurisdiction over his person either by consent, waiver, regular transfer or any other means. As the Circuit Court of Appeals pointed out, in its decision in the case at bar, ". . . it is true that the question of whether or not there could be a waiver of the irregularity in removal was not directly before the Supreme Court . . .", in the *Shamrock* case, and it is the contention of the petitioner herein that there was merely a waivable irregularity presented in the case at bar and that the law as to such waivable irregularities was not changed by the decision in the *Shamrock* case, but on the contrary that the question was not involved in the *Shamrock* case, and the decision rendered by the Tenth Circuit Court of Appeals in the case of *Lopata v. Handler*, 121 Fed. (2d) 938, subsequent to the rendering of the decision by this court in the *Shamrock* case, merely perpetuated the well established law as to waivable irregularities, and that the decision rendered by the Circuit Court of Appeals in the case at bar is therefore out of harmony with, and contrary to, the well established law, and should be set aside.

The decision in the *Lopata* case was rendered on July 24, 1941, and a rehearing was denied on August 28, 1941. In that case an action was removed from the state court of Oklahoma by a resident of Oklahoma, contrary to the same sentence of the same removal statute which would have prevented a removal of the case at bar had seasonable objection been made. It was held that the unauthorized transfer was waived by trial on the merits and by the consent of the offended party in the form of an express

waiver. It was further held that under such circumstances the question of whether the action should be tried in the State or Federal Court is not jurisdictional but one of venue only, which may be determined by the parties. The court declared that the action was one over which the District Court of the United States had jurisdiction under the jurisdictional statute (Judicial Code, Sec. 24, U. S. Code, Annotated, Title 28, Sec. 41), that it was an action which could have been commenced in that court in the first instance, that this is the true criterion of jurisdiction, and that the terms of the removal statute may be waived by the parties. It declares that where the action is within the jurisdiction of the United States District Court it is immaterial even if the transfer thereto was "wholly unauthorized." The decision thus confirms the unbroken line of authorities on this subject.

If every other portion of the removal statute (Judicial Code, Sec. 28, U. S. Code, Annotated, Title 28, Sec. 71) may be waived, why may not the clause in question be waived? The pertinent passage of that statute provides that appropriate actions, such as this, may be removed to the District Court of the United States "(1) for the proper district (2) by the defendant or defendants therein, (3) being nonresidents of that state." Clause (1) and clause (3) are both subject to waiver. Since the clauses immediately contiguous to the one alleged to be immune from waiver in the case at bar, the clause immediately preceding it and the clause immediately following it, may be waived, it is indeed difficult to find a basis for a contrary ruling as to the clause intervening. The requirement that the moving party be a nonresident is as much a part of the removal statute as the requirement that he be a defendant.

The jurisdiction of the District Courts of the United States is derived from a different statute than the removal statute. It is derived from U. S. Code Annotated, Title 28, Sec. 41, Judicial Code, Sec. 24, putting into effect Article III, Section 2, of the United States Constitution. The removal statute is U. S. Code Annotated, Title 28, Sec. 71, Judicial Code, Sec. 28. That the removal statute is not the statute conferring jurisdiction is self-evident and is repeatedly stated in the decisions. This is emphasized by the Supreme Court in *In re Moore*, 209 U. S. 490, which case contains an elaborate discussion of almost every facet of the subject of waiver. The terms of Section 41 cannot be waived. The terms of Section 71 have uniformly been held to be subject to waiver.

Lastly, the decision in *Shamrock v. Sheets* does not deal with the question involved in this case either in fact or in theory. It makes no reference to waiver save in a connection manifestly different from the one here involved. It could not have contained more than dictum upon the subject, but it does not contain even dictum. The question of jurisdiction was involved solely because one of the parties was held in the District Court of the United States against his will and over his timely and formal objection.

The *ratio decidendi* of the decision in that case, as shown by the concluding paragraph of the opinion, is the necessity of recognizing the independence of state governments and of confining Federal jurisdiction to the limits of the statute. Where a party is irregularly removed from the state court and retained in the Federal Court against his will and legal objection, there has manifestly been a divestiture of the state court's jurisdiction and an illegal seizure of jurisdiction by the Federal Court. But where

there is contemporaneous jurisdiction and a litigant, having the right to consent or choose, does choose, until too late to vacillate, to remain in the Federal Court, there has been no interference with personal rights or with state sovereignty or independence in any conceivable sense. There is no interference with state rights when a litigant consents to trial in the Federal Court until, having become disappointed with the result, he seeks unjustly to retrace his steps and pick up the privilege he voluntarily surrendered. There is no interference with the state court or with individual rights in such a case unless the complaining party was denied his privilege of returning to the state court, which was the fact in the *Shamrock* case.

Petitioner agrees that the question in the *Shamrock* case was jurisdictional, for the court never obtained jurisdiction over the defendant's person. By what means could it be said that the court did acquire jurisdiction over the defendant's person in that case? Not by consent, for he protested. Not by regular removal because, by the decision of the court, the removal was irregular and the irregularity was not waived. However, neither the holding, language, nor the *ratio decidendi* of the *Shamrock* case applies to a situation where there has been a waiver. The decision in that case had nothing to do with a question of waiver. It involved a question of seizure of power by the Federal Court over a protesting litigant who invoked all legal means to return to the state court and who never acquiesced to Federal jurisdiction.

Since the jurisdiction of the District Courts of the United States exists independently of the removal statute, it is uniformly held that where the case is one which is within the terms of the statute conferring jurisdiction,

the means whereby the parties enter the court is completely immaterial unless some party entitled to remove it makes seasonable application to do so. The criterion is whether or not the action could have been commenced in the Federal Court. If so, that court has jurisdiction and the parties may consent, expressly or by their conduct, to remain there. Where both courts have jurisdiction over the subject matter the parties may elect the tribunal they desire, and the choice may be express or by waiver. The power or privilege to waive the provisions of the removal statute is not limited to the choice of the particular districts of the Federal Courts but applies as well to an election to remain in the Federal Court rather than to return to the state court.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, in order that the conflict of decisions be resolved, and uniformity of decision be obtained, resulting in final determination of an important question of law, and that to such an end a writ of certiorari should be granted and this court should review the decision of the Circuit Court of Appeals and thereafter reverse it.

Dated this 19th day of October, 1942.

RAYMOND G. STANBURY,
Counsel for Petitioner.

PARKER & STANBURY,
HARRY D. PARKER,
VERNON W. HUNT,
Of Counsel.

Due service of the within petition and brief is hereby acknowledged this.....day of October, A. D. 1942.

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Counsel for Respondents.

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